

UNITED STATES DISTRICT COURT

**CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION**

RICHARD EDMOND RUSSELL, JR., ) Case No. CV 14-01976 (AS)  
                                    )  
Plaintiff,                     )  
                                    )  
v.                              )  
                                    )  
CAROLYN W. COLVIN, Acting    )  
Commissioner of Social        )  
Security,                     )  
                                    )  
Defendant.                    )  
                                    )

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On March 25, 2014, Plaintiff filed a Complaint seeking review of the denial of his applications for Disability Insurance Benefits and Supplemental Social Security Income. (Docket Entry No. 3). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 8, 11). On August 6, 2014, Defendant filed an Answer along with the Administrative Record ("AR"). (Docket Entry Nos. 13-14). The parties filed a Joint Stipulation

("Joint Stip.") on November 7, 2014, setting forth their respective positions regarding Plaintiff's claims. (Docket Entry No. 19).

The Court has taken this matter under submission without oral argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social Security Case," filed March 26, 2014 (Docket Entry No. 7).

## **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

On August 29, 2011, Plaintiff, formerly employed as a nursing assistant, home health care provider, and airplane detailer (see AR 38, 146), filed applications for Disability Insurance Benefits and Supplemental Social Security Income, alleging disability since August 20, 2003. (See AR 15, 37, 71-72, 126-133). At the commencement of the administrative hearing on October 31, 2012, Plaintiff waived his application for Disability Insurance Benefits, and elected to proceed solely with his application for Supplemental Social Security Income, alleging a disability since August 29, 2011. (See AR 37). The Administrative Law Judge ("ALJ"), Jan Donsbach, heard testimony from Plaintiff and vocational expert Sandra Trost. (See AR 37-53). On November 29, 2012, the ALJ issued a decision denying Plaintiff's application. The ALJ determined that Plaintiff had a severe impairment -- "residual fractures of the fibular and humerus" -- but found that Plaintiff was not disabled within the meaning of the Social Security Act. (See AR 15-22).

Plaintiff requested that the Appeals Council review the ALJ's decision. (AR 7-11). The request was denied on February 22, 2014. (AR 1-5). The ALJ's decision then became the final decision of the Commissioner, allowing this Court to review the decision. See 42 U.S.C. §§ 405(g), 1383(c).

## **PLAINTIFF'S CONTENTIONS**

Plaintiff alleges that the ALJ erred in failing to properly: (1) assess the medical evidence in determining Plaintiff's residual functional capacity; and (2) assess Plaintiff's credibility. (See Joint Stip. at 3-6, 10-13, 15-17).

## DISCUSSION

After consideration of the record as a whole, the Court finds that Plaintiff's first claim of error warrants a remand for further consideration. Since the Court is remanding the matter based on Plaintiff's first claim of error, the Court will not address Plaintiff's second claim of error.

**A. The ALJ Failed to Properly Assess the Medical Evidence**

The ALJ found that Plaintiff had the following RFC: the ability to perform light work<sup>1</sup> "except no more than occasional overhead reaching dominant right upper extremity." (See AR 22). In making this determination, the ALJ stated that he had afforded "great weight" to the "findings of the consultative examiner and DDS medical consultants." (AR 20). As set forth below, however, the ALJ rejected the findings of the consultative examiner without providing clear and convincing reasons and did not state the reasons for his reliance on the findings made by the DDS medical consultant.

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<sup>1</sup> "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. §§ 404.1567(b) and 416.967(b).

1           Consultative Examiner John Chung, M.D.

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3           The ALJ summarized the November 29, 2011 findings of the  
4 consultative examiner, John Chung, M.D., following an orthopedic  
5 evaluation, including X-rays. (See AR 18, 254-63). Dr. Chung diagnosed  
6 Plaintiff with: "Internal derangement of the right shoulder with  
7 fracture"; "Probable adhesive capsulitis of the right shoulder";  
8 "Derangement of the right hip as well as fracture" and "Internal  
9 derangement of the right knee, rule out fracture or torn meniscus," (AR  
254); and made the following functional assessment:

10           Based on the objective finding, he is not able to use the  
11 right upper extremity to perform any task at or above  
12 shoulder level. He had difficulty doing any pulling or  
13 pushing type of activity using the right upper extremity.  
14 There is no limitation for the left upper extremity. There  
15 is a probability that he has problem with his right knee  
16 and this needs to be ruled out, therefore, he will have  
17 limitation of standing or walking capacity. In an 8-hour  
18 day, he is able to stand and walk 2 hours and sit for 6  
19 hours. He is not able to lift and carry using the right  
20 upper extremity. He has postural limitation. He also had  
21 environmental limitation because of his writing problem.  
22 At the present time, I feel that he has difficulty in doing  
23 any type of physical activity on his right upper and lower  
24 extremity. Further diagnostic evaluation is indicated.

25  
26           (AR 258).

27           Although the ALJ purported to afford great weight to Dr. Chung's  
28 opinions, the ALJ's determination on Plaintiff's RFC actually gave Dr.  
Chung's opinions very little weight. Indeed, the ALJ did not  
specifically address Dr. Chung's opinions as to Plaintiff's postural and  
environmental limitations.

1       The ALJ rejected Dr. Chung's opinion about Plaintiff's ability to  
2 lift and carry was "excessively restricted" based on: (a) Plaintiff's  
3 "admission that he can carry small bags of groceries and perform small  
4 chores, as noted in his Exertional Activity Questionnaire" (see AR 18,  
5 citing AR 163-65 [In an Exertion Questionnaire dated October 22, 2011,  
6 Plaintiff wrote, "I can carry a small bag of groceries" and "I can do  
7 small chores"]); and (b) Plaintiff's testimony at the hearing that he  
8 takes out the trash, does a little walking and recycles bottles and cans  
9 (see AR 18, 43-44). However, these reasons do not meet the clear and  
convincing standard.

10      First, the ALJ mischaracterized Plaintiff's statements, since  
11 Plaintiff did not claim that he could perform daily activities on an  
12 unlimited basis. (See AR 164-65 [In the Questionnaire, Plaintiff wrote,  
13 "I can carry a small bags (sic) of groceries, because of pain in  
14 shoulder I can not (sic) do this often" and "I can do small chores if it  
15 doesn't involve using my right shoulder (sic) or standing for any length  
16 of time."]); AR 43-44 [At the hearing, Plaintiff testified, "I usually  
17 try to get out and do a little bit of walking, I recycle when I can" and  
18 "I take out the trash."]. Second, Plaintiff's statements about his  
19 ability to perform daily activities generally was not inconsistent with  
20 Dr. Chung's opinion because Plaintiff could have performed such  
21 activities with his left hand (see AR 45), the use of which Dr. Chung  
22 did not restrict. Third, Plaintiff's ability to perform certain daily  
23 activities, such as carrying groceries, taking out the trash, walking,  
and recycling, did not support the adverse credibility finding as to Dr.  
Chung. See Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007).

24      The ALJ also rejected Dr. Chung's opinions based on Plaintiff's  
25 testimony that his pain is relieved with medication (see AR 18). This  
26 reason was also not clear and convincing. The ALJ does not cite to any  
27 part of the record where Plaintiff testified that his pain was relieved  
28 with medication and the record does not reflect that Plaintiff testified  
his pain was totally relieved with medication. At the hearing,

1 Plaintiff testified that medication and a heating pad "eases the pain a  
 2 little bit" on his right shoulder and hip, and that with medication his  
 3 right knee pain goes down to a level of 3 (see AR 47-48). Moreover, in  
 4 the Exertion Questionnaire, Plaintiff stated that he could not carry  
 5 things very far unless he first takes pain medications. (See AR 164).  
 6 The record does not substantiate the ALJ's characterization about  
 Plaintiff's pain relief.

7  
 8 The final reason given by the ALJ for discrediting Dr. Chung's  
 9 opinions was the absence of evidence of ongoing medical treatment, the  
 10 problems with certain records suggesting Plaintiff is disabled and/or  
 11 temporarily unemployable, and the allegedly infrequent and irregular  
 12 nature of Plaintiff's treatment (see AR 18-19). Contrary to the ALJ's  
 13 assertion (see AR 18-19), however, it appears that at least some records  
 14 concerning Plaintiff's disability and/or temporary unemployability were  
 15 signed by an acceptable medical source. (See AR 303-05). In any event,  
 16 the ALJ failed to explain how Dr. Chung's opinions about Plaintiff's  
 17 limitations were affected by such matters. The case relied on by  
 18 Defendant to support the ALJ's reason (see Joint Stip. at 7, citing Fair  
v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989) relates only to a claimant's  
 credibility determination.<sup>2</sup>

19  
 20 Thus, the Court finds that the ALJ erred in his assessment of the  
 21 examining physician's opinions (see Joint Stip. at 5, 10), by failing to  
 22 provide "clear and convincing" reasons for rejecting Dr. Chung's  
 23 testimony. See Lester v. Chater, supra, 81 F.3d at 831 ("[T]he  
 24 Commissioner must provide 'clear and convincing' reasons for rejecting  
 the uncontradicted opinion of an examining physician.").

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 27       <sup>2</sup> The Court will not consider reasons for discounting Dr.  
 28 Chung's opinions (see Joint Stipulation at 7) that were not given by the  
 ALJ in the Decision. See Pinto v. Massanari, 249 F.3d 840, 847-48 (9th  
 Cir. 2001); SEC v. Chenery Corp., 332 US 194, 196, 67 S.Ct. 1575, 91  
 L.Ed. 1995 (1947).

1       DDS Medical Consultant I. Kim:

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3       Although the ALJ purported to rely on the "opinions of the DDS  
4 medical consultants," (see Joint Stip. at 4, 10), the ALJ did not  
5 summarize or discuss any such opinions and, contrary to the ALJ's  
6 assertion, the record reveals only one consultant who provided an opinion  
7 regarding Plaintiff's functional limitations. A "Disability Determination  
8 Explanation," (see AR 62-70), prepared by I. Kim on February 1, 2012  
9 stated that Plaintiff had the following RFC for the period of August 1,  
2012 to August 1, 2013:

10      Plaintiff had exertional limitations (Plaintiff could  
11 occasionally lift and/or carry 20 pounds and could frequently  
12 lift 10 pounds; Plaintiff could stand and/or walk about 6  
13 hours in an 8-hour workday; Plaintiff could sit about 6 hours  
14 in an 8-hour workday; Plaintiff could push and/or pull  
15 unlimited); Plaintiff had postural limitations (Plaintiff  
16 could occasionally climb ramps/stairs; Plaintiff could never  
17 climb ladders/ropes/scaffolds; Plaintiff could frequently  
18 balance, stoop, kneel and crouch; Plaintiff could never  
19 crawl); Plaintiff has manipulative limitations (Plaintiff is  
20 limited with his ability to use his right arm to reach in  
front and/or laterally and overhead; Plaintiff can handle,  
21 finger and feel unlimited); and Plaintiff does not have any  
visual, communicative or environmental limitations.

22  
23 (AR 67-68).

24  
25      The ALJ failed to explain why he was giving this opinion such great  
26 weight. See 20 C.F.R. §§ 404.1527(e)(2)(ii), 416.927(e)(2)(ii) ("Unless  
27 a treating source's opinion is given controlling weight, the  
28 administrative law judge must explain in the decision the weight given  
to the opinions of a State agency medical or psychological consultant

1 . . . ."); Lewin v. Schweiker, 654 F.2d 631, 634 (9th Cir. 1981) ("The  
 2 circuit courts have consistently recognized the need for full and  
 3 detailed findings of fact essential to the Secretary's conclusion.");  
 4 see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) ("The  
 5 opinion of a nonexamining physician cannot by itself constitute  
 6 substantial evidence that justifies the rejection of the opinion of  
 7 either an examining physician or a treating physician") (emphasis in  
 8 original). Moreover, as Plaintiff asserts and Defendant does not  
 9 dispute (see Joint Stip. at 4, 10), since I. Kim identified himself as  
 10 a "SDM" (which apparently is a substitute decision maker), it is not  
 11 clear that the ALJ was entitled to rely on his opinions. See 20 C.F.R.  
 12 §§ 404.1527(e)(2)(i), 416.927(e)(2)(i) ("State agency medical and  
 13 psychological consultants and other program physicians, psychologists  
 14 and other medical specialists are highly qualified physicians,  
 psychologists, and other medical specialists who are also experts in  
 Social Security disability evaluation.").

15 **B. Remand Is Warranted**

17 The decision whether to remand for further proceedings or order an  
 18 immediate award of benefits is within the district court's discretion.  
 19 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
 20 useful purpose would be served by further administrative proceedings,  
 21 or where the record has been fully developed, it is appropriate to  
 22 exercise this discretion to direct an immediate award of benefits. Id.  
 23 at 1179 ("[T]he decision of whether to remand for further proceedings  
 turns upon the likely utility of such proceedings."). However, where,  
 24 as here, the circumstances of the case suggest that further  
 25 administrative review could remedy the Commissioner's errors, remand is  
 26 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);  
Harman v. Apfel, supra, 211 F.3d at 1179-81.

Since the ALJ failed to properly evaluate the opinions of the consultative examiner and the State Agency medical consultant, remand is appropriate. Because outstanding issues must be resolved before a determination of disability can be made, and "when the record as a whole creates serious doubt as to whether the [Plaintiff] is, in fact, disabled within the meaning of the Social Security Act," further administrative proceedings would serve a useful purpose and remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir. 2014)(citations omitted).<sup>3</sup>

## ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 20, 2015

/s/

<sup>3</sup> The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be appropriate at this time. “[E]valuation of the record as a whole creates serious doubt that Plaintiff is in fact disabled.” See Garrison v. Colvin, 759 F.3d 995, 1021 (2014). Accordingly, the Court declines to rule on Plaintiff’s claims regarding the ALJ’s questions to the vocational expert (see Joint Stip. at 5-6, 11) and the ALJ’s assessment of Plaintiff’s credibility (see Joint Stip. at 11-13, 15-16). Because this matter is being remanded for further consideration, these issues should also be considered on remand.